UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

LAKEPOINTE SENIOR CARE AND REHAB CENTER, LLC[1]

Employer

and **Case 07-RC-143710**

SEIU HEALTHCARE MICHIGAN[2]

Petitioner

APPEARANCES:
Grant T. Pecor and Karen Berkery, Attorneys, of Grand Rapids and Detroit, Michigan, respectively, for the Employer.
Benjamin Curl, of Detroit, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

The Employer operates a nursing care facility.

Petitioner seeks to represent approximately 34 charge nurses, including 14 licensed practical nurses (LPNs) and 10 registered nurses (RNs),[3] employed at the Employer's Clinton Township facility; but excluding wound care nurses, Minimum Data Set (MDS) nurses,[4] and all other employees, guards and supervisors as defined in the Act.[5]

The Employer maintains that the petitioned-for unit is inappropriate inasmuch as the charge nurses are supervisors within the meaning of Section 2(11) of the Act, as previously

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing
[3] The parties are in agreement that all of the petitioned-for charge nurses, whether RN or LPN, possess the same responsibilities and authority for purposes of deciding supervisory status, and that the only difference between them is in their job duties in that only RNs can start IVs and perform resident assessments.
[4] The record briefly mentions that the Employer employs some MDS nurses who are RNs. At the hearing, the Petitioner took the position that the MDS nurses should be excluded from the unit because they do not share the same job responsibilities as the charge nurses. The Employer did not take any position on this issue. As there is minimal evidence in the record regarding the MDS nurse position, and the Employer does not argue that it should be included, it will be excluded from the unit as requested by the Petitioner.
[5] The proposed unit description appears as amended by Petitioner at the hearing.

determined in 2005.[6] The Employer alternatively asserts that if the charge nurses are found not to be supervisors, the unit must include one wound care nurse, who performs the same duties as the charge nurses and shares a community of interest with them.

As discussed below, based on the record and relevant Board law, while I find that the charge nurses possess authority to take corrective action, I conclude that the Employer has not satisfied its burden of proof that the charge nurses exercise authority in the interest of the Employer requiring the use of independent judgment to discipline employees, or that they are held accountable by the Employer, and thus, they are not statutory supervisors. Petitioner's proposed unit, with the addition of the wound care nurse classification, is appropriate.

I. Employer's Procedural Arguments

The Employer argues that I should have granted its pre-hearing motion to dismiss the petition and prohibited the relitigation of ***Lakepointe I***, under the doctrines of *res judicata* and collateral estoppel.[7] At the hearing, the Employer renewed its motion, as well as moved for the Petitioner to show cause, or in the alternative, make an offer of proof, as to changed circumstances that justify the relitigation of the instant matter.

I reject the Employer's contention that the Petitioner may not file the instant petition based on its belief that circumstances have changed such that the employees in question are no longer supervisory within the meaning of Section 2(11). In so finding, I reject the cases cited by the Employer in its brief all of which address litigation of issues in unfair labor practice proceedings which had previously been addressed in representation proceedings. Rather, I reference the Board's longstanding rule in unit clarification proceedings, that with newly discovered evidence, previously unavailable evidence, or changed circumstances, a party may challenge the validity of a union's certification based on a belief that the unit members are statutory supervisors, even if it failed to raise such issue during the representation proceeding. ***I.O.O.F. Home of Ohio, Inc***., 322 NLRB 921, 922-923 (1997).

The Board has also found that while it may be that certain of the positions sought to be excluded by a unit clarification petition have long been included under previous contracts, and the job duties of those positions have remained unchanged, nonetheless, if it can be shown that the persons in such positions meet the test for establishing supervisory, managerial, or confidential status, it is compelled to exclude them. See ***The Washington Post***, 254 NLRB 168, 169 (1981). If there are no changed circumstances in terms of job duties, this, too, may constitute evidence on the status of the individuals sought to be excluded. ***The Washington Post***, supra at 169. Likewise, if there are changed circumstances, newly discovered evidence, or previously unavailable evidence presented in the instant matter, such that these employees who were once found to be supervisory no longer exercise or are in possession of such authority, then I am compelled to so find and provide them the opportunity to vote for inclusion in a collective bargaining unit.

[6] See ***Lakepointe Senior Care and Rehab, LLC***, Case 07-RC-022861, hereafter ***Lakepointe I***.
[7] On January 8, 2015, I denied the Employer's pre-hearing motion to dismiss the petition.

II. Analysis

A. Board Law

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are "statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer." ***NLRB v. Kentucky River Community Care***, 532 U. S., 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

In applying this three part test, the Board continues to follow certain established principles. First, the party asserting supervisory status bears the burden of proof. ***Oakwood Healthcare, Inc.***, 348 NLRB 686, 687 (2006); ***NLRB v. Kentucky River Community Care***, 532 U.S. 706, 711-712 (2001). Second, any lack of evidence is construed against the party asserting supervisory status. ***Elmhurst Extended Care Facilities, Inc***., 329 NLRB 535, 536 fn. 8 (1999). Third, the Board's long-standing recognition that purely conclusory evidence is not sufficient to establish supervisory status remains viable. ***Golden Crest Healthcare Center***, 348 NRLB 727, 731 (2006); ***Volair Contractors, Inc***., 341 NLRB 673, 675 (2004); ***Sears, Roebuck & Co***., 304 NLRB 193, 194 (1991).

With regard to the exercise of supervisory authority, the Board has determined that individuals who possess the authority as defined in Section 2(11) of the statute can be held to be supervisors even if the authority has not been exercised. ***Fred Meyer Alaska, Inc***., 334 NLRB 646 (2001). Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. ***Avante at Wilson, Inc.***, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. ***Golden Crest Healthcare Center,*** 348 NLRB 727, 731 (2006), citing ***Training School at Vineland***, 332 NLRB 1412, 1416 (2000); See also ***Chevron Shipping Co.***, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without specific explanation are not enough).

Additionally, the Board cautions against finding supervisory authority based only on infrequent instances of its existence. ***Family Healthcare, Inc***., 354 NLRB 254 (2009) (overruled on other grounds); ***Golden Crest Healthcare***, supra at 730, fn.9. To separate straw bosses from

true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and requires the use of independent judgment. Accordingly, "the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee." ***Somerset Welding & Steel, Inc***., 291 NLRB 913 (1988), quoting ***Feralloy West Co***., 277 NLRB 1083, 1084 (1985).

Thus, "the Board . . . exercise[s] caution 'not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." ***Oakwood***, supra at 688, quoting ***Chevron Shipping Co***., supra at 381; ***Azusa Ranch Market***, 321 NLRB 811, 812 (1996).

B. Application of Board Law to this Case

In reaching the conclusion that the Employer has not satisfied its burden of proof that the charge nurses exercise authority in the interest of the Employer requiring the use of independent judgment to discipline employees, or that they are held accountable by the Employer, I rely on the following analysis and record evidence.[8]

(1) The Employer's Operations

The Employer's nursing care facility is divided into three wings, A, B, and C, and operates round-the-clock with three shifts: the day shift is from 7:00 a.m. to 3:30 p.m.; the afternoon shift is from 3:00 p.m. to 11:30 p.m.; and the midnight shift is from 11:00 p.m. to 7:30 a.m. In addition, some of the nursing staff work 12-hour shifts from 7:00 a.m. to 7:30 p.m. or 7:00 p.m. to 7:30 a.m., and some work 16-hour shifts from 7:00 a.m. to 11:30 p.m.

Administrator Jami Horton manages the facility. The nursing department is headed by Director of Nursing (DON) Tanya McCauley. Nursing management also includes three Clinical Care Coordinators (CCCs) (one per each wing): Mona Rutkowicz, Michelle Graves, and Teresa Luczak.[9] All of these individuals work day shift hours until about 5:00 p.m. There is also a late night supervisor, an assignment that is rotated among the Employer's department heads, such as MDS, dietary, maintenance, or social work, who is present at the facility until 7:00 p.m. to handle all in-house matters, including nursing matters. The Human Resources (HR) department is headed by HR Manager Jennifer Schrauben.[10]

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[8] The Employer additionally argues that having met the burden of proving the supervisory status of the charge nurses in ***Lakepointe I***, it would be prejudicial error to place the burden on the Employer again in the instant matter. The Employer cites no Board cases in support of its argument, and I see no reason to depart from the Board's long standing precedent in this regard

[9] The parties stipulated, and I find, that Horton, McCauley, Rutkowicz, Graves, and Luczak are supervisors within the meaning of the Act as they possess and exercise one or more of the following indicia of supervisory authority: authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees; or authority to responsibly direct employees or to adjust their grievances, or to effectively recommend such action, utilizing independent judgment in exercising such authority.

[10] Although the record is silent as to the supervisory status of the late night supervisor and HR manager Schrauben, because the late night supervisor position is rotated among the Employer's department heads, and neither party raised any dispute as to supervisory status, I find that the late night supervisor is a supervisor within the meaning of the Act. I also find that Schrauben is a supervisor within the meaning of the Act based on her authority with regard to the hiring and discharge of employees as stated in the record.

Besides the charge nurses, the nursing department staff consists of approximately 90 certified nursing assistants (CNAs), and activity aides, restorative aides and ward clerks. These classifications, along with dietary aides, porters, cooks, laundry aides, and maintenance employees, are in a bargaining unit currently represented by the Petitioner.

Staffing levels are dictated by State and Federal regulations and budgetary constraints. During the day and afternoon shifts, there are approximately two to three charge nurses and three to four CNAs assigned to each wing. The record is not as clear as to the staffing on the midnight shift, although it appears that there may be two charge nurses and four CNAs assigned per wing on the midnight shift.

(2) Assignment of Work

The Board in ***Oakwood*** defined assigning work as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." ***Oakwood***, supra at 689.

(a) Time

The CNAs' scheduled hours are determined by scheduler Venus Whittner.[11] These schedules include shift and wing assignments. The charge nurses and CNAs often remain assigned to the same wing. The charge nurses do not possess authority to change the assigned shifts of the CNAs. However, they do possess authority to extend CNA shifts and approve overtime if the CNA has not completed all of his/her assigned tasks. In extending CNA shifts, the charge nurses complete an "Overtime Authorization" form. The record indicates that the purpose of the charge nurse completing this form is to document the reasons that a CNA is staying over in order to avoid improper usage of overtime by the CNAs. Any CNA overtime is ultimately approved by a higher management official. The charge nurses do not call in additional CNAs when a shift is understaffed. Rather, the front desk is staffed until 11:30 p.m. and handles all call-ins. CNA breaks are according to the facility practices and as designated by their collective bargaining agreement. The CNAs are required to notify a charge nurse when going on break, and break times can be adjusted by the charge nurses based on resident and staffing needs. The Employer has not established the exercise of supervisory authority by charge nurses in scheduling CNAs. See ***Golden Crest Healthcare Center***, supra, at 728-730.

(b) Place and Tasks

In ***Oakwood***, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that this assignment of nursing staff to specific geographic locations within the emergency room fell within the definition of "assign" for purposes of Section 2(11). ***Oakwood***, supra at 695. Here, the CNAs

[11] The record indicates that Whittner was promoted from a CNA position to "Central Info." It appears that neither party seeks her inclusion in the unit, and based on the limited record concerning Whittner, I find she would not be appropriately included in a charge nurse unit.

are assigned to their wing and resident group by the scheduler. Their daily tasks are largely defined by the assignment sheet generated by management. The charge nurses complete assignment sheets for their wing and shift once they receive a list of CNAs assigned to the shift. The assignment sheet is pre-printed and the charge nurses complete it by adding the names of the CNAs, the patient rooms they are assigned to, and any extra duties they are to perform in addition to their regular day-to-day duties. Extra duties might include checking safety devices or monitoring resident snacks. The nurses' assignment of these "discrete task[s]" is closer to "ad hoc assignments" described in ***Croft Metals***, 348 NLRB 717, 721 (2006). In that case, the Board found that the switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status. ***Croft Metals***, supra at 722. Here, the nurses' assignments of discrete tasks to CNAs is insufficient to confer supervisory status.

The charge nurses also possess authority to transfer CNAs to different wings based on staffing and resident needs. When a CNA is needed for staffing on another wing, the scheduler will notify the charge nurse of such need. There is a pool list kept at the nurses' station which charge nurses utilize to dispatch a CNA to the requested unit, or the CNAs may decide among themselves who will go. The record does not establish that any charge nurse who may transfer a CNA to a different wing takes into account the CNA's abilities. Any occasional transfer due to short-staffing is nothing more than switching the tasks among employees, and does not confer supervisory status. ***Croft Metals***, supra at 722. The Employer has not established that any isolated temporary reassignment of duties of a CNA for the balance of a shift denotes supervisory status. Id.

(c) Independent Judgment and Assignment of Work

In ***Oakwood***, the Board found that the term "assign" encompassed a charge nurse's responsibility to assign nurses and aides to particular patients. ***Oakwood***, supra at 689. The Board found that "if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment." ***Oakwood***, supra at 693. The Board found that the charge nurses who worked outside of the emergency room used independent judgment in matching patients and nursing staff. For example, nurses who were proficient in administering dialysis were assigned to a kidney patient. The charge nurse assigned staff with skills in chemotherapy, orthopedics or pediatrics to the patients with needs in those areas. Charge nurses also assigned the nursing personnel to the same resident to ensure continuity of care. The nurses who were assisting a patient with a blood transfusion were not assigned to other ill patients. Charge nurses determined whether a mental health nurse or an RN should be assigned a psychiatric patient. ***Oakwood***, supra at 696-697. In contrast, the Board found that the emergency room charge nurses did not "take into account patient acuity or nursing skill in making patient care assignments." The evidence did not show "discretion to choose between meaningful choices on the part of charge nurses in the emergency room." ***Oakwood,*** supra at 698.

As noted above, the scheduler, not the charge nurses, makes initial patient assignments to CNAs, and their overall tasks are largely defined by the assignment sheets generated by management, not the charge nurses. To the extent the charge nurses make isolated

reassignments, the Employer has not shown that they perform a detailed analysis of CNAs' abilities and residents' needs. Rather, the record demonstrates that the charge nurses' assignments for CNAs are routine in nature and not based on any particular expertise possessed by the CNA. In the spectrum set out by the Board, the charge nurses' assignment of discrete tasks and the isolated temporary switching of tasks by charge nurses falls closer to "completely controlled" actions, rather than "free actions." They do not involve a "degree of discretion that rises above routine or clerical." ***Oakwood,*** supra at 693. Thus, the assignment of tasks does not require the use of independent judgment.

I further conclude that, even if the charge nurses "assign" by appointing CNAs to a particular time or schedule, or by giving them significant overall duties, they do not exercise independent judgment in such assignments. Concerning the charge nurses' assignments of CNAs to particular "times" of work, the Board held in ***Oakwood*** that "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices;" but that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policy or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement." ***Oakwood***, supra at 697-698. The initial scheduling, performed by the scheduler, involves no choice at all on the charge nurses' part. In addition, the charge nurses possess no authority to call employees in to work, and the Employer's practice and the CNA contract does not allow for choices by the charge nurses' with regard to requesting CNAs to stay over their shift. The nurses' limited role in signing overtime authorization forms does not constitute a "discretionary choice." It does not require the use of independent judgment.

(3) Independent Judgment and Discipline

The ***Oakwood*** Board, consistent with ***Kentucky River***, adopted an interpretation of "independent judgment" that applies to any supervisory function at issue "without regard to whether the judgment is exercised using professional or technical expertise." The Board explained that "professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." ***Oakwood***, supra at 692. The Board then set forth standards for determining whether the exercise of those functions is carried out with independent judgment: "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." ***Oakwood***, supra at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. Further, the judgment must involve a degree of discretion that rises above the "routine or clerical." Id.

Regarding the asserted disciplinary authority of the charge nurses, under Section 2(11) of the Act, individuals are statutory supervisors if they have the authority, in the interest of the employer, to discipline employees or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but

requires the use of independent judgment. ***Oakwood***, supra at 687; ***Arlington Masonry Supply***, 339 NLRB 817, 818 (2003).

In the instant matter, if a charge nurse believes that a CNA is not providing adequate care, is improperly conducting procedures, or not completing tasks in a timely manner, the charge nurse has authority and discretion to (1) do nothing; (2) verbally counsel the CNA without issuing any write-up; (3) complete a written "one-on-one" form;[12] or (4) record the incident on an Employee Action Improvement Process (EAIP) form. The EAIP forms, kept at the nurses' station on each unit, replaced the Employee Disciplinary Warning Record (disciplinary warning) form about four years ago. Charge nurses do not need approval from management to write an EAIP. The charge nurses complete the EAIP by writing out the incident in question on the form under "Describe Situation or Concerns." The form lists levels of discipline at the top, including "verbal coaching," "formal counseling," "written warning," "suspension," and "discharge." The charge nurse does not check off the level of discipline because she does not know where the CNA is in the progressive discipline system. Charge nurses do not have access to CNA personnel files. The Employer's HR manager testified that charge nurses will come to her office to learn where a CNA is in the disciplinary progression, and the HR manager will write in the level on the EAIP. No charge nurse or other witness corroborates this. At any rate, the record overwhelmingly demonstrates that the charge nurses do not place any level of progressive discipline on the form.

Unlike the old disciplinary warning form, the EAIP does not include a specific section for rule violations.[13] In ***Lakepointe I***, charge nurses reviewed the employee rule book, determined which rule was violated, and indicated that rule violation on the form when completing it. The instant record demonstrates that this is no longer the case. At most, the record testimony indicates that some of the more senior charge nurses, who were employed when the old disciplinary warning form was in effect, reference a catch-all "Group 1/Rule 13 - failure to perform job duties satisfactorily" on the EAIP. The overwhelming weight of the evidence shows that any work rule violation indicated is written or typed by the HR manager under the paragraph "Previous Counseling/Disciplinary Action (provide date, level of discipline, & issue)," after the EAIP comes to human resources. The Employer's work rules are in evidence as part of the training module for the charge nurses. The Employer argues that they are discussed in detail with the charge nurses during their orientation, but the testimony of HR manager Schrauben was conclusory at best regarding the discussion of the work rules and the charge nurses' related responsibilities during charge nurse orientation. Thus, the Employer has failed to establish through the preponderance of the evidence that the charge nurses determine employee violations of work rules.

While the charge nurse may place comments regarding expected corrective behavior on the EAIP under the paragraph "Describe Desired/Expected Behavior," the charge nurse does not make any recommendation for action on the EAIP form. Upon completing the EAIP, the charge

[12] The record is limited regarding the one-on-one forms. Only one charge nurse testified about the one-on-one form, that it may be used by charge nurses to document an instruction provided by a charge nurse to a CNA. There are no such forms in the record.

[13] The former disciplinary warning form included the section "DESCRIPTION OF OFFENSE/POLICY VIOLATION(s)/WORK RULE #."

nurse signs the write-up at the line indicating "supervisor" and turns it in to a CCC, the DON or HR manager, if available, or to the front desk for placement in the CCC, DON, or HR in-box. There is an employee signature line and comment section on the EAIP form which can be completed by the offending employee but it is not required. In ***Lakepointe I***, the charge nurses presented a disciplinary warning directly to the CNA. In the instant matter, the charge nurses do not present the EAIP to the offending CNA because it is incomplete (i.e., not yet having a rule violation or proper discipline progression) at the time of the charge nurse's involvement. The record is unclear as to whether and how the EAIP is thereafter issued to the CNA. All of the charge nurses testified that they are often unaware whether an EAIP that they have written will actually result in discipline.

There are four Employer exhibits of CNA write-ups in the record. In Employer Exhibit 5, charge nurse handwrote an EAIP, dated July 1, 2013, regarding a CNA's failure to change and check on a resident. There is no record evidence that this charge nurse made any recommendation regarding level of discipline. In Employer Exhibit 20, another charge nurse handwrote an EAIP, dated December 23, 2014, regarding a CNA's failure to wake and dress a resident, as well as the CNA's rude and disrespectful behavior toward the charge nurse. This write-up was independently investigated by the DON; a new EAIP, dated December 29, 2014, was typed out; the charge nurse was referred to in the third person; and the incident resulted in the suspension of the CNA. Employer Exhibit 25 consists of one typed EAIP concerning a CNA's refusal to go to another wing for a staffing shortage. While this incident occurred on November 21, 2013, the EAIP, which references the charge nurse in the third person, was not signed until November 27, by the HR manager, and was thereafter signed by the charge nurse on November 30. There is no record evidence that this charge nurse made any recommendation regarding level of discipline. Finally, in Employer Exhibit 26, a charge nurse handwrote an EAIP regarding a CNA's failure to provide care to a resident. When the DON received this write-up, due to the potential severity of the offense she consulted with the Administrator, and upon further investigation, the DON and Administrator determined that the CNA had additionally falsified documents regarding patient care. As a result, another EAIP was prepared noting falsification of records and reports, including "one's time card of [*sic*] time card of another", as well as the failure to provide care; the termination box at the top was checked, and the EAIP was signed by the Administrator and HR manager, and the CNA was terminated. The charge nurse was not involved in the subsequent investigation, and did not sign the termination write-up.

The foregoing leads me to conclude that while the charge nurses can take corrective action by recording and reporting deficiencies in CNAs' job performance, these corrective actions fall short of disciplinary authority because charge nurses do not impose or effectively recommend discipline. ***Community Education Centers***, 360 NLRB No, 17, slip op at 2 (2014), citing ***Oakwood***, supra at 692-693.

The Employer argues that the charge nurses discipline employees exercising independent judgment. The Employer relies on ***Oak Park Nursing Care Center***, supra at 28-29, in which the Board found that LPNs at the employer's long-term care facility were supervisors by virtue of their authority to discipline, and effectively recommend discipline of employees, recommendations which were accepted without further independent investigation. In so finding

the Board specifically noted that for two employees, the progressive disciplinary process, which was initiated by LPNs filling out employee counseling forms, resulted in discharge and suspension. However, it is undisputed in the instant matter that the charge nurses possess no independent authority to suspend or terminate employees. Rather, such actions are subject to an independent investigation by a higher management official. Moreover, the LPNs in ***Oak Park*** had knowledge of the offending employees' previous write-ups, a fact that is not present here. The ***Oak Park*** Board also found that the LPNs had the authority to effectively recommend discipline in view of two specific incidences: one involving a LPN recommending to a DON, without any independent investigation, that a CNA not work on the weekend due to her failure to clean a resident, and another involving a LPN recommending to a DON that a CNA be sent home based on patient neglect. The ***Oak Park*** Board concluded that the LPNs therein made explicit recommendations of discipline for CNAs. No similar evidence is present in the instant matter. To the contrary, the weight of the evidence demonstrates that despite their role in completing EAIPs, the charge nurses herein do not make effective recommendations as to discipline.

The Employer's reliance on ***ITT Lighting Fixtures Inc.***, 265 NLRB 1480 (1982), to further support its argument that the charge nurses have authority to discipline or effectively recommend discipline is inapposite. Decided well before the Board refined its analysis for determining supervisory status through ***Kentucky River*** and ***Oakwood,*** and their progeny, ***ITT Lighting Fixtures*** repeatedly references "major supervisory authority" a concept that has no bearing on today's post ***Oakwood*** analysis.

(4) Responsible Direction

In ***Oakwood***, the Board interpreted the Section 2(11) phrase "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' (as explained below) and carried out with independent judgment." ***Oakwood***, supra at 690-691. The Board, in agreement with several U.S. courts of appeals, held that, for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. ***Oakwood***, supra at 691-692. The Board defined "accountability" as follows:

> [T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. ***Oakwood***, supra at 692.

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, **and** that there is a "prospect of adverse consequences" for others' deficiencies. ***Community Education Centers***, supra, slip op. at 2; ***Oakwood***, supra, 691-692, 695.

The Employer argues in its brief that the requirement of accountability "is more than satisfied by the evidence that the…[charge nurses] have been repeatedly informed that there will be material consequences to their terms and conditions of employment as a result of [the CNAs] deficiencies," and relies on ***Schnurmacher Nursing Home v. NLRB***, 214 F.3d 260, 267 (2nd Cir. 2000), a pre-***Oakwood*** case, in support of its argument that charge nurses have been held accountable for the conduct of CNAs.

In ***Schnurmacher***, the 2nd Circuit held that the charge nurses therein were supervisors based solely on their exercise of power to "responsibly to direct," and their exercise of independent judgment in doing so.[14] The record therein contained "evidence of undisputed instances in which [charge nurses] had been disciplined for failing to direct staff properly in the provision of patient care." at 266. Relying on ***Spentonbush/Red Star Cos. v. NLRB***, 106 F.3d 484 (2d Cir.1997), the ***Schnurmacher*** Court held:

> "To be responsible is to be answerable for the discharge of a duty or obligation. In determining whether "direction" in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs."

The instant record contains one EAIP issued to a charge nurse referencing a CNA's performance. The Employer contends that the subject of this write-up, i.e., failure to check whether the CNA completed her assigned tasks at the end of the shift, was the direct responsibility of the charge nurse, and this is arguable evidence of actual accountability. I find that this EAIP clearly concerns the charge nurse's own failure to perform her job duties satisfactorily, rather than that of the CNA. Indeed, the DON very specifically testified that charge nurses are disciplined for their **own** failures regarding patient care, and not those of the CNAs.

The evidence presented by the Employer does not demonstrate that it holds the charge nurses accountable for the CNAs' poor performance. Rather, the evidence actually demonstrates that the charge nurses are accountable for their own work, i.e., their own failure and errors, and not those of the CNAs. ***Community Education***, supra, slip op. at 1, 2; see also ***Entergy Mississippi, Inc***., 357 NLRB No. 178, slip op. at 7-8 (2011). I find that there is insufficient record evidence to establish accountability as required under ***Oakwood***. The record does not demonstrate that the Employer imparted clear and formal notice to the charge nurses that they will be held accountable for the job performance of CNAs. See ***Golden Crest***, supra at 731. Additionally, patient care is ultimately and undeniably the direct responsibility of the charge nurses, and the one EAIP in the record does little to distinguish this responsibility from any accountability for a CNA's failure to provide adequate or appropriate care. See ***Frenchtown Acquisition Co., Inc. v. NLRB***, 683 F.3d 298, 306 (6th Cir. 2012), enfd 356 NLRB No. 94 (2011).

[14]The Court rejected the employer's arguments that the charge nurses were supervisors on any other basis finding specifically that they did not exercise supervisory authority to promote and reward, their referrals of misconduct did not establish disciplinary authority, and their exercise of authority to assign CNAs to patients and to dictate their break times did not require independent judgment.

The Employer has not met its burden to establish that the charge nurses are accountable for their actions in *directing* the CNAs.

The record demonstrates that the charge nurses oversee CNAs' job performance and act to correct the CNAs when they are not providing adequate care, up to and including corrective action. For example, a charge nurse will correct the CNA if she perceives that the CNA is not performing her resident care duties such as changing, waking, or dressing a resident. The record also demonstrates that the charge nurses will direct the CNAs to perform certain tasks when the charge nurse determines that such tasks are necessary. For example, the charge nurses will direct CNAs to wake, feed, toilet, and transfer residents. However, the Employer has not demonstrated that the charge nurses direct the CNAs using independent judgment, or that charge nurses' direction of the CNAs is not controlled by the Employer's own policies or procedures or involves a degree of discretion rising above the merely routine. ***Community Education Centers,*** supra, slip op. at 2, citing ***Oakwood*** supra at 692-693.

Evaluations of CNAs and charge nurses

The CNAs are evaluated annually.[15] The charge nurses occasionally assist the CCCs, upon request, in completing the annual CNA evaluations. In this regard, the charge nurses rank the CNAs with whom they have worked on a scale of one (needs improvement), two (meets expectations), or three (exceeds expectations), in 17 points in the areas of key responsibilities, interpersonal skills and conduct. The evaluating charge nurse may also briefly record comments about the CNA on the performance evaluation form. The charge nurses in ***Lakepointe I*** checked either a yes or no box on the CNA evaluation form as to whether the evaluated employee was recommended for continued employment. There is no such box on the current CNA evaluation form or any evidence that, in evaluating the CNAs, the charge nurses herein make any recommendations for continued employment. It takes a CNA about three to four minutes to complete a CNA evaluation form. One charge nurse testified that in a six-month period she has completed about five CNA evaluations on request, all in one day; another charge nurse testified that she completes about one evaluation every two months; another charge nurse testified she has not completed any CNA evaluations, rather they are all completed by the CCC on her wing. The charge nurses do not discuss or present the evaluations to the CNAs. Once completed, the CNA evaluations are turned into the DON for independent review, final signature and approval. In ***Lakepointe I***, only the charge nurses and evaluated employees signed off on the evaluations, and there was no review of such evaluations by higher management. In the instant matter, the CNA evaluations are signed by the CNA, charge nurse, and the DON or other management official. Four CNA evaluations were presented in the record.

The charge nurses also participate in completing a "competencies assessments" evaluation form for newly hired CNAs within three weeks following their orientation period. This two-page form contains signature lines for three "evaluators," one RN, and the evaluated employee. Thus, the charge nurse appears to be one of four evaluators, which may include an

[15] In ***Lakepointe I***, the charge nurses completed evaluations of probationary CNAs following their 90-day probationary period, and thereafter on an annual basis. In the instant matter, for at least one to two years, probationary evaluations of CNAs have not taken place due to staffing shortages.

experienced CNA, or other nurses. The evaluators check off on the form whether the CNA is adequately performing routine resident care and documentation skills. There is no evidence that the evaluators make any recommendations for continued employment of the evaluated CNA. Three CNA competencies assessments forms were presented in the record.

The charge nurses are also evaluated annually by a CCC. They are evaluated in the areas of assigning and directing CNAs; enforcing facility practices and work rules; and administering discipline. Five charge nurse evaluations were presented in the record.

The Employer asserts in its brief that the CNA evaluations completed by charge nurses have an effect on the future employment of the evaluated employees. This is not supported by the record. The evaluations are not used to determine whether a CNA receives a raise, because the contract between the Employer and Petitioner dictates the CNAs' wage schedule. There is no showing that evaluations of CNAs affect their job tenure or status. The Employer has not established any practice of charge nurse involvement in the CNA evaluation process that establishes supervisory authority. Moreover, simply evaluating employees is not a statutory indicia of supervisory authority. The Board has consistently declined to find supervisory status based on evaluations without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the evaluated employee's job status. ***GS4 Regulated Security Solution***, 358 NLRB, slip op. at 3-4 (2013); ***Coventry Health Continuum***, 332 NLRB 52, 53-55 (2000); ***Ten Broeck Commons***, 320 NLRB 806, 813 (1996).

The Employer also argues that the charge nurses' own evaluations, in which they are evaluated regarding their supervisory authority, impact their future employment conditions. However, there is no evidence that any charge nurses suffered any negative consequences as a result of being evaluated in the areas of assigning and directing CNAs; enforcing facility practices and work rules; and administering discipline.

(5) Interviewing – Effective Recommendation to Hire

The Employer relies on ***Donaldson Brothers***, 341 NLRB 958 (2004) in asserting that the charge nurses participate in interviews of prospective employees and make recommendations for hiring. In ***Donaldson***, the Board found a foreman to be a supervisor based on his authority to effectively recommend the hire and fire of employees because he alone interviewed 10 applicants and recommended the hiring of two of those applicants, without any independent evaluation besides a review of the job application, and later recommended the termination of one.

The DON testified in a conclusory manner that charge nurses herein participate in CNA and LPN interviews and make hiring recommendations following such interviews, as well as on-the-job new hire training. No specific examples were provided and the DON could not recall any CNA or LPN applicants or charge nurse interviewers, or any prospective employee who had been hired based on a charge nurse's recommendation. Moreover, the DON acknowledged that a charge nurse has not participated in any prospective employee interviews for at least two years. There is no evidence that the charge nurses, nor the CCCs for that matter, have any independent authority to hire. Rather, all hiring decisions appear to be made by the Administrator and DON,

in conjunction with the HR manager. Thus, I find the Employer's reliance on ***Donaldson*** to be misplaced.[16]

(6) ***Secondary Indicia***

The existence of secondary indicia, such as title and higher pay, standing alone, is insufficient to demonstrate supervisory status. ***Shen Automotive Dealership Group***, 321 NLRB 586, 594 (1996); ***Billows Electric Supply***, 311 NLRB 878 fn.2 (1993). The charge nurses and CCCs wear the same colored scrub uniforms with different colored lab coats, while the CNAs wear different colored scrubs and lab coats.[17] The charge nurses attend monthly nurse meetings, but do not attend supervisory meetings held daily, attended by the Administrator, DON, CCCs and other department managers. New charge nurses and CNAs are trained in both a classroom setting and on the job. The classroom orientation program is conducted by the DON. Charge nurses are not involved in CNA orientations. Charge nurse on-the-job training is by the in-service director,[18] CCCs, and other charge nurses. CNA on the-job-training is by the in-service director, CCCs, charge nurses, and other CNAs. CNAs also attend periodic in-services which are lead by an in-service director, the DON or a CCC. The job descriptions of the charge nurses purport to vest them with authority over CNAs to make assignments, evaluate, train, discipline, and recommend hiring. However, as demonstrated above, the record does not establish that the charge nurses perform such functions for the Employer utilizing independent judgment. I conclude that the job description is a mere paper conveyance of supervisory authority that does not impart actual supervisory authority. ***Golden Crest***, supra at 731, citing ***Training School at Vineland***, 332 NLRB 1412, 1416 (2000); ***Loyalhanna Health Care Associates*** 352 NLRB 863, 864 (2008); ***Chevron U.S.A., Inc.***, 309 NLRB 59, 62 (1992) (job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority).

The Employer urges that the charge nurses working during off-hours from 7:00 p.m. to 7:00 a.m. are the highest level nursing personnel in the building, and as a result possess supervisory authority. However, the Employer's on-call policy dictates that the charge nurses during these hours are to call the DON or Administrator for a multitude of events including staffing, patient abuse, injury, and missing charts. As noted, the charge nurses do not call in additional CNAs when a shift is understaffed. The absence of supervisors does not imply that charge nurses must be supervisors. Nothing in the statutory definition of supervisor suggests that service as the highest-ranking worker on site requires a supervisory finding. ***Loyalhanna Health Care Associates***, supra at 865; ***Spirit Construction Services, Inc.***, 351 NLRB 1042, fn. 2 (2007); ***Training School at Vineland***, supra at 1412 fn. 3. The reality that the scheduler and front desk personnel are responsible for on-call duties until 11:30 p.m. and the Administrator and DON are always on-call undercuts the Employer's argument imputing supervisory status to the charge nurses because they are the highest-ranking employees on duty. ***Loyalhanna Health***

[16] The Employer's reliance on ***Venture Industries***, 327 NLRB 918 (1999), another pre-***Oakwood*** case, is also misplaced. The Board therein found that department and line supervisors in question possessed authority within the meaning of Section 2(11) to discipline employees and to make effective recommendations regarding the selection of production employees to fill in-plant jobs without analyzing whether the disputed employees took such action using independent judgment.

[17] The CCCs also have an option to wear business attire with a lab coat instead of scrubs.

[18] The record does not contain any information about the in-service director.

Care Associates, supra at 865, citing ***Golden Crest***, supra at 730 (finding that service as highest-ranking employee on duty was "even less probative where management is available after hours").

Finally, I note that if the charge nurses are found to be supervisors, the ratio of supervisors to employees would be quite high. The Employer would employ no non-supervisory nurses. Overall, for the day and afternoon shifts there would be at least 12 supervisors for approximately 9 CNAs; about 57% percent of the Employer's day and afternoon shift nursing department staff of 21 employees would be supervisory. This is an unusually top-heavy ratio. ***Oakwood***, supra at 715-716; ***Beverly California Corp.,*** supra at 1555-1556 (classifying 25% of nursing home staff as supervisors makes ranks of supervisors "pretty populous"); ***NLRB v. Res-Care, Inc.***, 705 F.2d 1461,1468 (7th Cir. 1983) (33% found to be high); ***Airkaman, Inc***., 230 NLRB 924, 926 (1977) (one to three ratio is unrealistic and excessively high).

C. Wound Care Nurse

The Employer employs one wound care nurse at its facility, who it includes in its list of charge nurses.[19] The current wound care nurse, an LPN, works during the day shift throughout the facility, alongside the charge nurses, and primarily performs resident wound care. She is trained in and responsible for completing documentation specific to wound care procedures. The wound care nurse covers for charge nurses in the units, as dictated by staff shortages. Although the Petitioner states in its brief that the wound care nurse "evidently receives a higher starting pay rate," the record clearly demonstrates that her pay rate, while at the higher range, is in-line with the charge nurse pay rates. She also enjoys the same insurance benefit package as the charge nurses. The wound care nurse attends the same orientation and wears the same uniforms as the charge nurses. The wound care nurse attends the clinical portion of the daily management meetings attended by the nursing and other managers in the facility.

A primary consideration in determining an appropriate unit is whether there is a shared community of interest between the employees that would require their inclusion in the unit. ***NLRB v. Action Automotive, Inc.***, 469 U.S. 490(1985). The Board looks to a variety of factors to determine whether a community of interest exists, including, *inter alia*, the nature of employee skills and functions, common supervision, the degree of functional integration of operations, the differences in the types of work and the skills of employees, the extent of centralization of management and supervision, the extent of interchange and contact between groups of employees, general working conditions and fringe benefits, and bargaining history. ***International Bedding Company***, 356 NLRB No.168, slip op. at 2 (2011); ***Boeing Co***., 337 NLRB 152, 153 (2001); ***NLRB v. Paper Mfrs. Co***., 786 F.2d 163, 167 (3rd Cir. 1984); ***Rinker Materials Corp***. 294 NLRB 738, 738-739 (1989).

I agree with the Employer that the wound care nurse shares a community of interest with the petitioned-for employees that requires her to be included in the unit. In so finding, I also note that if the wound care nurse is not included in the petitioned-for unit, then she would be denied the opportunity to be represented in collective bargaining because there are no other employees

[19] This list names the wound care nurse as Dawn Howard and specifically refers to her job classification as "wound care coordinator," although the parties referred to her throughout the hearing as a wound care nurse.

at the Employer's facility which would constitute an appropriate separate unit. The Board does not favor such a resolution. ***Vecellio & Grogan***, 231 NLRB 136, 136-137 (1977); ***MDS Courier Services, Inc***., 242 NLRB 405, 406 (1979). See also, ***KCAL-TV***, 331 NLRB 323, 325 (2000), citing ***Sonoma-Marin Publishing Co***., 172 NLRB 625, 626 (1968), and ***Mount St. Joseph's Home for Girls*** 229 NLRB 252, 253 (1977).

D. Contingent Nurses

The Employer employs approximately seven contingent nurses, who perform the same duties as the charge nurses. The Employer urges that any charge nurses characterized as contingent should be eligible to vote subject to the average-hours-worked formula set forth in ***VIP Movers***, 232 NLRB 14 (1977) (citing ***Davison-Paxon Co***., 185 NLRB 21 (1970)) and ***Allied Stores of Ohio***, 175 NLRB 966 (1969) (finding employees who regularly average four hours or more per week for the last quarter prior to the eligibility date have a sufficient community of interest for inclusion in the unit). The Petitioner did not take a position regarding the inclusion of contingent nurses in the petitioned-for unit, however the numbers elicited comprising the charge nurses includes the contingent charge nurses.

For on-call employees who work on a regular basis, the Board utilizes the eligibility formula set forth in ***Davison-Paxon Co***., supra, and ***Sisters of Mercy Health Corp***., 298 NLRB 483 (1990). Accordingly, contingent nurses are eligible to vote in the election ordered herein if they regularly average four hours or more of work per week during the quarter immediately prior to the eligibility date.

E. Conclusions and Findings

Based on the foregoing discussion and on the entire record,[20] I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[20] Both parties timely filed briefs, which were carefully considered.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and contingent charge nurses and wound care nurses employed by the Employer at its facility located at 37700 Harper, Clinton Township, Michigan; but excluding all MDS nurses, all other employees, guards and supervisors as defined in the Act.

The unit set out above includes professional and nonprofessional employees.[21] However, the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, the desires of the professional employees must be ascertained as to inclusion in a unit with nonprofessional employees.

Therefore, I shall direct separate elections in the following voting groups:[22]

> **VOTING GROUP A:**
>
> All full-time, regular part-time, and contingent licensed practical nurse charge nurses and wound care nurses employed by the Employer at its facility located at 37700 Harper, Clinton Township, Michigan; but excluding all MDS nurses, all other employees, guards and supervisors as defined in the Act.
>
> **VOTING GROUP B:**
>
> All full-time, regular part-time, and contingent registered nurse charge nurses employed by the Employer at its facility located at 37700 Harper, Clinton Township, Michigan; but excluding all MDS nurses, all other employees, guards and supervisors as defined in the Act.

The nonprofessional employees (Voting Group A) will be polled to determine whether they wish to be represented by the Petitioner. The professional employees (Voting Group B) will be asked the following two questions on their ballot:

> 1. Do you desire to be included with nonprofessional employees in a single unit for the purposes of collective bargaining?

[21] The parties stipulated that the RNs are professional employees.

[22] While the Petitioner did not take a specific position whether it wished to proceed to election in both separate voting groups if found appropriate, at the hearing the Petitioner agreed to proceed to election in any unit that I find to be appropriate. The Petitioner is allowed 14 days from the date of this Decision and Direction of Election to provide an additional showing of interest, if necessary, for each of the voting groups. In order to facilitate a check of the showing of interest, the Employer is requested to submit immediately, and in no event later than seven days from the date of the Decision and Direction of Election, an alphabetized list of employees in Voting Group A and Voting Group B.

2. Do you desire to be represented for the purposes of collective bargaining by SEIU Healthcare Michigan?

If a majority of the professional employees (Voting Group B) vote "Yes" to the first question, indicating their desire to be included in a unit with non-professional employees, they will be so included. Their votes on the second question then will be counted together with the votes of the nonprofessional employees (Voting Group A) to determine whether the employees in the overall unit wish to be represented by the Petitioner. If, on the other hand, a majority of the professional employees vote against inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will be separately counted to determine whether they wish to be represented by the Petitioner in a separate unit.

Thus, the unit determination is based, in part, upon the results of the election among the professional employees. However, I make the following findings in regard to the appropriate unit:

If a majority of the professional employees vote for inclusion in the unit with nonprofessional employees, I find the following single unit will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and contingent charge nurses and wound care nurses employed by the Employer at its facility located at 37700 Harper, Clinton Township, Michigan; but excluding all MDS nurses, all other employees, guards and supervisors as defined in the Act.

If a majority of the professional employees do not vote for inclusion in the unit with nonprofessional employees, I find the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A:

> All full-time, regular part-time, and contingent licensed practical nurse charge nurses and wound care nurses employed by the Employer at its facility located at 37700 Harper, Clinton Township, Michigan; but excluding all MDS nurses, all other employees, guards and supervisors as defined in the Act.

Unit B:

> All full-time, regular part-time, and contingent registered nurse charge nurses employed by the Employer at its facility located at 37700 Harper, Clinton Township, Michigan; but excluding all MDS nurses, all other employees, guards and supervisors as defined in the Act.

Those eligible shall vote whether they wish to be represented for the purposes of collective bargaining by SEIU Healthcare Michigan.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 13th day of February 2015.

/s/ Terry Morgan

Terry Morgan, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the units found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SEIU HEALTHCARE MICHIGAN.** The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the units who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.*** 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **February 20, 2015**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever

proper objections are filed. The list may be submitted to the Regional Office by e-filing through the Agency's website, **www.nlrb.gov**,[23] by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **February 27, 2015**. The request may be filed electronically through the Agency's website, **www.nlrb.gov**,[24] but may **not** be filed by facsimile.

[23] To file the eligibility list electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

[24] To file a Request for Review electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.